UNITED STATES DISTRICT COURT DISTRICT OF MAINE

THOMAS J. BARTELHO,)	
Movant)	
v.)	Civil No. 05-27-P-H Criminal No. 95-29-P-H
UNITED STATES OF AMERICA, Respondent)	

RECOMMENDED DECISION ON RULE 60(b) MOTION

Thomas Bartelho has filed a pleading styled as a Federal Rule of Civil Procedure 60(b) motion attacking the denial of his 28 U.S.C. § 2255 motion by this court on January 13, 2000. He asks the court to revisit and correct this judgment because the United States Supreme Court's <u>Crawford v. Washington</u>, 541 U.S. 36 (2004) has changed the landscape of the confrontation clause jurisprudence under which his § 2255 motion was adjudicated.

In <u>Rodwell v. Pepe</u>, the First Circuit explained that when "the motion challenges only the etiology of the habeas judgment itself. ... it makes sense to consider the motion as a Rule 60(b) motion simpliciter rather than as a second or successive habeas petition." 324 F.3d 66, 70 (1st Cir. 2003). It expressed a reluctance to "subscribe to a 'one size fits all' taxonomy for the handling of Rule 60(b) motions in the habeas context" and directed that the "inquiry ... proceed case by case.").

I am confident that Bartelho's present motion is not in fact a Rule 60(b) challenge to etiology of the § 2255 judgment itself but is really a second § 2255 motion. See

Sanders v. Bartow, No. 99-C-421-C, 2004 WL 2202677, *1 -2 (W.D. Wis. Sept. 27, 2004).

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). In order to pursue his <u>Crawford</u> claim Bartelho must first obtain permission from the court of appeals as provided by 28 U.S.C. § 2244(b)(3)(A).

The question of whether <u>Crawford</u> applies retroactively to cases on collateral review is an interesting one. <u>Compare Mungo v. Duncan</u>, 393 F.3d 327, 335-36 (2d Cir. 2004) (no) <u>with Bockting v. Bayer</u>, __ F.3d __, __, 2005 WL 406284, *1 -2 (9th Cir. Feb. 22, 2005) (yes). However, it is clear that in order to legitimately raise <u>Crawford</u> in a second or successive § 2255 motion, <u>Crawford</u> must first be "made retroactive to cases on collateral review <u>by the Supreme Court</u>." 28 U.S.C. § 2244(b)(2)(A).

For the reasons above I recommend that the Court **DISMISS** Bartelho's Federal Rule of Civil Procedure 60(b) motion because it is really a second attempt at 28 U.S.C. § 2255 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

March 11, 2005.

/s/Margaret J. Kravchuk U.S. Magistrate Judge

BARTELHO v. USA

Assigned to: JUDGE D. BROCK HORNBY
Referred to: MAG. JUDGE MARGARET J.
Date Filed: 02/11/2005
Jury Demand: None

KRAVCHUK Nature of Suit: 510 Prisoner:

Related Case: 2:95-cr-00029-DBH Vacate Sentence

Cause: 28:2255 Motion to Vacate / Correct Illegal Jurisdiction: U.S. Government

Sentenc Defendant

Plaintiff

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